An Analysis of the Amendment dated November 06, 2009 in SEBI (SAST) Regulations, 1997

Introduction:

SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 is a small Code with far wider implications. These regulations play a major role in driving the acquisition and restructuring exercises of every Company of India. However, the provisions of these regulations have always been subject to multi-interpretations since its enactment. These multi-interpretations of provisions and absence of single decided point of view has outshined the constructive spirit of these regulations to excel the corporate sector without prejudicing the interest of any investor. The consequences are being faced in the form of resistance to adherence to Takeover approach considering this code as a major hindrance and massive failures in legal compliances leading to onerous penalties.

Thus, a need arises to realign the regulations so as to remove the hidden ambiguities involved in the regulations which have been one of the major causes of defiance with the Regulations. Accordingly, SEBI has constituted a committee for the review of SEBI Takeover Regulations and invited the suggestions from the public.

Now, vide notification dated November 06, 2009, a number of amendments have taken place in the SEBI Takeover Regulations. An analysis of the same is attached herewith for your reference.

Regulation Number	**Before amendment dated November 06, 2009**	**After amendment dated November 06, 2009**	**Analysis of amendment**
Regulation 3(2):	**<u>Legal Text:</u>** Nothing contained in **Chapter III** of the regulations shall apply to the acquisition of Global Depository Receipts or American Depository	**<u>Legal Text:</u>** Nothing contained in **regulation 10, regulation 11 and regulation 12** of these regulations shall apply to the acquisition of Global	Before the amendment, regulation 3(2) of SEBI Takeover Regulations provides the exemption from the applicability of chapter III of the said regulations on the acquisition of ADRs or

	Receipts so long as they are not converted into shares carrying voting rights.	Depository Receipts or American Depository Receipts unless the holders thereof, - (a) **become entitled to exercise voting rights, in any manner whatsoever, on the underlying shares; or** **(b) exchange such Depository Receipts with the underlying shares carrying voting rights.**	GDRs **<u>except where such GDRs or ADRs are converted into shares carrying voting rights.</u>** However, after the notification dated November 06, 2009, in addition to the exception mentioned above, one more exception from the availability of exemption under regulation 3(2) has been included which provides that the **no exemption from the applicability of regulation 10, 11 and 12 of SEBI Takeover Regulations would be available on the acquisition of ADRs or GDRs where the holder is entitled to exercise voting rights on the underlying shares.**
Regulation 7(1A)	**<u>Legal Text:</u>** Any acquirer who has acquired shares or voting rights of a company	**<u>Legal Text:</u>** Any acquirer who has acquired shares or voting rights of a	Prior to the notification, the disclosure under regulation 7(1A) is necessitated by the acquirer who is holding the shares in terms

	under sub-**<u>regulation (1) of regulation 11</u>**, shall disclose purchase or sale aggregating two per cent or more of the share capital of the target company to the target company, and the stock exchanges where shares of the target company are listed within two days of such purchase or sale along with the aggregate shareholding after such acquisition or sale.	company **<u>under sub-regulation (1) of regulation 11, or under second proviso to sub-regulation (2) of regulation 11</u>** shall disclose purchase or sale aggregating two per cent or more of the share capital of the target company to the target company, and the stock exchanges where shares of the target company are listed within two days of such purchase or sale along with the aggregate shareholding after such acquisition or sale.	of regulation 11(1) i.e. equal to or more than 15% but less than 55% shares. After notification, besides the disclosure mentioned above, an acquirer who has acquired the shares in terms of the newly inserted proviso to regulation 11(2) allowing the further acquisition of 5% is also required to give the disclosure under regulation 7(1A) of SEBI Takeover Regulations.
Regulation 11(1)	**<u>Legal Text:</u>** No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15 per cent or more but less than fifty five per cent (55%) of the shares or voting rights in a	**<u>Legal Text:</u>** No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15 per cent or more but less than fifty five per cent (55%) of the shares or	Prior to the notification, it is not clear whether an acquirer, who is holding the shares under regulation 11(1), can increase his shareholding to 55% or more in terms of the creeping acquisition allowed under regulation 11(1).

	company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5% of the voting rights, in any financial year ending on 31st March unless such acquirer makes a public announcement to acquire shares in accordance with the regulations.	voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5% of the voting rights, **with post acquisition shareholding or voting rights not exceeding fifty five per cent.**, in any financial year ending on 31st March unless such acquirer makes a public announcement to acquire shares in accordance with the regulations.	**After Notification:** Now, it has been specifically provided that an acquirer, who is holding the shares in terms of regulation 11(1), can acquire further 5% shares as creeping acquisition in any financial year increasing his shareholding to 55%. In other words, under regulation 11(1), the acquirer is allowed to increase his shareholding to the level of 55% and not beyond it.
Second proviso to Regulation 11(2)	**Legal Text:** Provided further that such acquirer may, without making a public announcement under these Regulations, acquire, either by	**Legal Text:** Provided further that such acquirer may, **notwithstanding the acquisition made under regulation 10 or sub-regulation**	In terms of the Notification, the creeping acquisition allowed under second proviso to regulation 11(2) would be available to the acquirer irrespective of the acquisition made by him under regulation 10

	himself or through or with persons acting in concert with him, additional shares or voting rights entitling him upto five per cent.(5%) voting rights in the target company subject to the following:- (i) the acquisition is made through open market purchase in normal segment on the stock exchange but not through bulk deal /block deal/ negotiated deal/ preferential allotment; or the increase in the shareholding or voting rights of the acquirer is pursuant to a buyback of shares by the target company; (ii) the post acquisition shareholding of the acquirer together with persons acting in concert with him shall not increase beyond seventy five per cent.(75%).	**<u>(1) of regulation 11</u>**, without making a public announcement under these Regulations, acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him upto five per cent. (5%) voting rights in the target company subject to the following:- (i) the acquisition is made through open market purchase in normal segment on the stock exchange but not through bulk deal /block deal/ negotiated deal/ preferential allotment; or the increase in the shareholding or voting rights of the acquirer is pursuant to a buyback of shares by the target company; (ii) the post acquisition shareholding of the acquirer together with persons acting in	or 11(1). **For instance:** i. On April 01, 2009, Mr. A is holding 50% shares in the Target Company. ii. During the period April – October 2009, the acquirer has acquired further 5% shares increasing his shareholding to 55%. iii. Now, in terms of notification, the acquirer can further acquire 5% shares in the same financial year i.e. 2009- 10 in terms of second proviso to regulation 11(2).

		concert with him shall not increase beyond seventy five per cent.(75%).	
Regulation 14(2)	**Legal Text:** In the case of an acquirer acquiring securities, including Global Depository Receipts or American Depository Receipts which, when taken together with the voting rights, if any already held by him or persons acting in concert with him, would entitle him to voting rights, exceeding the percentage specified in regulation 10 or regulation 11, the public announcement referred to in sub-regulation (1) shall be made not later than four working days before he acquires voting rights on such securities upon conversion, or exercise of option, as the case may be.	**Legal Text:** In the case of an acquirer acquiring securities, including Global Depository Receipts or American Depository Receipts which, when taken together with the voting rights, if any already held by him or persons acting in concert with him, would entitle him to voting rights, exceeding the percentage specified in regulation 10 or regulation 11, the public announcement referred to in sub-regulation (1) shall be made not later than four working days before he acquires voting rights on such securities upon conversion, or exercise of option, as the case may be.	Now the holder of ADRs or GDRs are not only required to give the public announcement on the conversion of ADRs or GDRs into shares carrying voting rights but also on the acquisition of such ADRs or GDRs where holder thereof is entitle to exercise the voting rights on the underlying shares in excess of percentage specified in regulation 10 or regulation 11 and such public announcement is required to be made within four working days of acquisition of such depository receipts.

		Provided that in case of American Depository Receipts or Global Depository Receipts entitling the holder thereof to exercise voting rights in excess of percentage specified in regulation 10 or regulation 11, on the shares underlying such depository receipts, public announcement shall be made within four working days of acquisition of such depository receipts.	

Question 1:

Whether the exemption under regulation 3(2) of SEBI Takeover Regulations from the applicability of regulation 10, 11 and 12 would be available to the holder of ADRs or GDRs who is entitle to exercise the voting rights on the underlying shares in excess of the limit specified under regulation 10 or 11 of said regulations?

Answer:

No. In terms of Notification dated November 06, 2009, the holder of ADRs or GDRs would not be entitle to any exemption under regulation3 would be required to give the public announcement where he is entitle to exercise the voting rights on the underlying shares in excess of the limit specified under regulation 10 or 11 of said regulations.

Question 2:

Whether an acquirer who is holding 50% shares in the Target Company can acquire further 5% shares as creeping acquisition in terms of regulation 11(1) of SEBI Takeovers Regulations increasing his shareholding to 55%?

Answer:

Yes. In terms of notification dated November 06, 2009, an acquirer who is holding shares in terms of regulation 11(1) is allowed to acquire further 5% shares as creeping acquisition provided that his post acquisition shareholding does not go beyond 55% of the paid up capital of Target Company.

Thus, the acquirer who holds 50% shares in the Target Company can acquire further 5% shares increasing his shareholding to 55% of the paid up capital of the Target Company in terms of regulation 11(1) as amended vide notification dated November 06, 2009.

Question 3:

Whether an acquirer who is holding 52% shares in the Target Company can acquire further 5% shares as creeping acquisition in terms of regulation 11(1) of SEBI Takeovers Regulations increasing his shareholding to 57%?

Answer:

No. In accordance with regulation 11(1) as amended vide notification dated November 06, 2009, the acquirer is allowed to increase his shareholding to the maximum of 55% of the paid up capital of the Target Company.

Therefore, the acquirer who is holding 52% shares cannot acquire further 5% shares in one go as creeping acquisition without making the public announcement as his shareholding after the acquisition would go beyond the level of 55% as provided in the said regulations.

Question 4:

Whether the holder of ADRs or GDRs would be required to give the public announcement on the acquisition of such depository receipts? If yes, within how much time period the public announcement is to be made?

Answer:

Yes. The holder of ADRs or GDRs would be required to give the public announcement on the acquisition of such depository receipts where the holder thereof is entitle to exercise the voting rights on the underlying shares in excess of percentage specified in regulation 10 or regulation 11 and such public announcement is required to be made within four working days of acquisition of such depository receipts.

Question 5:

Whether an acquirer who is holding 52% shares on April 01, 2009 has acquired 3% shares during the period April to October, 2009 increasing his shareholding to 55% can acquire further shares in terms of the second proviso to regulation 11(2) in the same financial year i.e. 2009-10?

Answer:

Regulation 11(2) as amended vide notification dated November 06, 2009 provides that notwithstanding the acquisition made under regulation 10 or sub-regulation (1) of regulation 11, an acquirer can acquire the shares in terms of second proviso to regulation 11(2) provided that the acquisition is made through stock mechanism in normal segment and not through bulk deal/block deal/preferential allotment or where the increase in shareholding is pursuant to buyback by the Target Company provided that shareholding of the acquirer does not go beyond 75% of the paid up capital of the Target Company.

Conclusion:

Thus, it can be said that by means of notification, SEBI has bring the clarity in the key regulations and has remove the ambiguities involved in the SEBI Takeover Regulations. However, still there is a need of further modification in the regulations to ensure the adherence to the same.

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